

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte ANTHONY BRENNAN and JOHN W. GARDENIER

Appeal 2007-2481
Application 10/055,513
Technology Center 3700

Decided November 29, 2007

Before TONI R. SCHEINER, ERIC GRIMES, and LORA M. GREEN,
Administrative Patent Judges.

GRIMES, *Administrative Patent Judge.*

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a fluid flow system for a hydrotherapy tub. The Examiner has rejected the claims as including new matter, anticipated, and obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm in part.

BACKGROUND

The Specification discloses “a fluid flow system for a hydrotherapy tub which includes a body adapted for mounting to a hydrotherapy tub” (Spec. ¶ 0006). The “body . . . allows water and air from single respective sources to be ejected into the tub through multiple outlets. Thus, the body

allows for multiple air water froth outlets without using multiple holes in the tub to supply air and water to the same outlets.” (*Id.*)

The application’s Figure 2 is reproduced below (with unneeded reference numerals omitted):

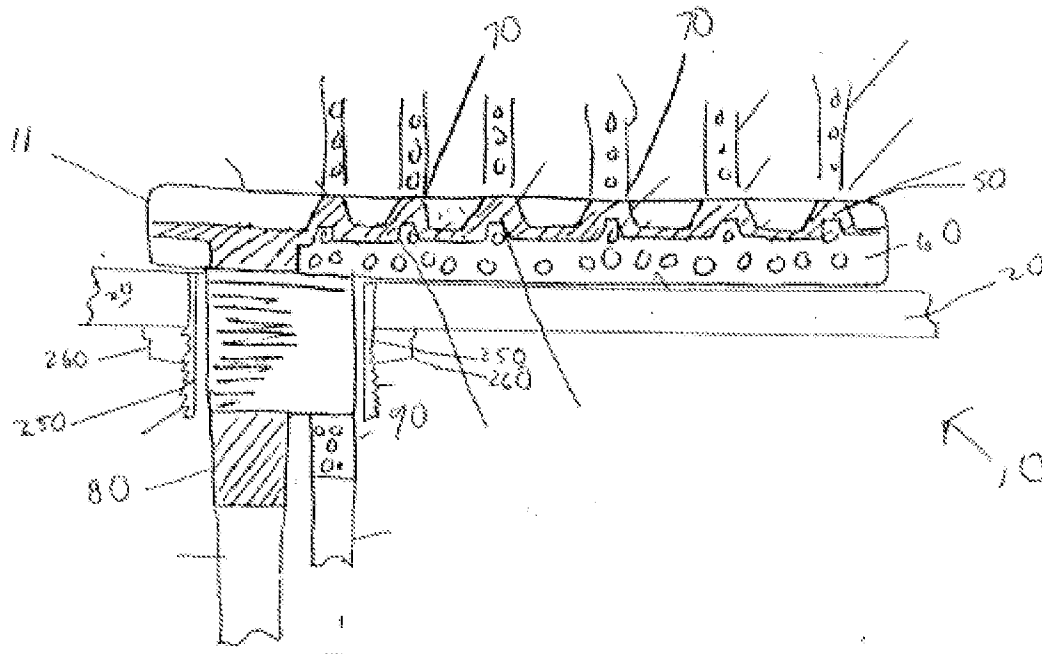


Figure 2 shows “a fluid flow system 10 [that] may include a body 11 mounted on a wall 20 or other surface of a spa or hydrotherapy tub” (Spec. ¶ 0018). The fluid flow system “includes a first chamber 50 adapted for fluid communication with a water source (referred to as ‘the water chamber’), a second chamber 60 adapted for fluid communication with an air source (referred to as ‘the air chamber’), and a plurality of outlets 70 . . . configured to transmit water from water chamber 50 and air from air chamber 60” to the interior of the hydrotherapy tub (*id.*). “Fluid flow system 10 receives water and air through a first inlet 80 and a second inlet 90, respectively” (*id.* at ¶ 0019).

DISCUSSION

1. CLAIMS

Claims 1-18, 21, 23-32, 34-36, 40, and 41 are on appeal. Claims 19, 20, 22, 33, and 37-39 are also pending but have been withdrawn from consideration by the Examiner.

The claims have not been argued separately and therefore stand or fall together. 37 C.F.R. § 41.37(c)(1)(vii). Claim 1 is representative and reads as follows:

1. A fluid flow system for a hydrotherapy-tub, said system comprising:

a body configured to be attached to a hydrotherapy tub having an opening through a surface of said tub such that said body covers the opening and said body is immovable and affixed to said surface during operation, said body comprising:

a water inlet and an air inlet;

a first chamber said water inlet configured to extend through the opening to transmit water to said first chamber through the opening;

a second chamber, said air inlet configured to extend through the opening to transmit air to said second chamber through the opening;

a plurality of outlets in fluid communication with said first chamber and said second chamber; and

wherein said plurality of outlets is configured to transmit water from said first chamber and air from said second chamber to an interior of the hydrotherapy-tub.

2. NEW MATTER

Claims 1-18, 21, 23-32, 34-36, 40, and 41 stand rejected under 35 U.S.C. § 112, first paragraph, for lack of adequate written description. The Examiner reasons that “Claim 1 recites a body ‘immovable and affixed to said surface during operation’. This subject matter is not described in the originally filed disclosure and is therefore considered to be new matter.” (Answer 4.)

Appellants point to Figure 2 of the application (reproduced above) and paragraphs 29 and 30 of the Specification as providing support for the disputed claim limitation (App. Br. 6-7). Those parts of the Specification describe Figure 2 as showing that “fluid flow system 10 may include sidewalls 250 surrounding inlets 80 and 90. For instance, sidewalls 250 may include exterior threads . . . for mating with a nut 260 to securely position fluid flow system 10 on tub wall 20” (Spec. ¶ 0029). The Specification also states that fluid flow system 10 may be “mounted to tub wall 20 using epoxy or a similar water-tight sealant. . . . In one preferred embodiment, the epoxy affixes fluid flow system 10 in a position that extends through part of tub wall 20” (*id.* at ¶ 0030).

We agree with Appellants that the Examiner has not adequately explained why a person of ordinary skill in the art would not recognize from the Specification’s description that Appellants were in possession of the claimed apparatus, including the limitation that it be “immovable and affixed to [the tub’s] surface during operation.” The rejection of the claims under 35 U.S.C. § 112, first paragraph, is reversed.

3. ANTICIPATION BY MARTIN

Claims 1-10, 18, 21, 23, and 28-32 stand rejected under 35 U.S.C. § 102(b) as anticipated by Martin.¹ The Examiner points to Figures 7-10 of Martin as showing a fluid flow system comprising a body, water and air inlets, first and second chambers, and a plurality of outlets (Answer 5).

Appellants argue that Martin does not disclose

a body configured to be attached to a hydrotherapy tub having an opening through a surface of the tub such that the body covers the opening and the body is immovable and affixed to the surface during operation. Instead, . . . the conduits of Martin extend toward a faucet and above a water surface, but there is no disclosure of inlets configured to extend through openings in a tub.

(App. Br. 10-11.)

In response, the Examiner asserts that

the Martin body is capable of being used with a tub having an opening (e.g. in the bottom) as functionally recited. Furthermore, should one decide to insert the air and water inlets . . . through such an opening, the body would then cover the opening and be “immovable and affixed to said inner surface during operation” in the same sense as with appellants’ disclosed invention.

(Answer 5.)

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros., Inc. v. Union Oil Co.*, 814 F.2d 628, 631 (Fed. Cir. 1987). In this case, claim 1 requires a body configured to be attached to a tub having an opening through its surface, and having two

¹ Martin, US 1,982,259, issued Nov. 27, 1934.

inlets configured to extend through the opening and transmit water and air, respectively, to two chambers in the body.

Martin discloses an apparatus that comprises inlets and separate chambers for air and water and a plurality of outlets, but Martin's device is configured to be placed into an existing bath tub. See, e.g., Martin, Figure 7. The water inlet of Martin's device is configured to attach to the faucet of the bath tub and the air inlet is configured to be hung from the edge of the bath tub (*id.*; see also p. 3, ll. 128-131). Thus, Martin's device does not meet the limitations of claim 1 requiring that the body be "configured to be attached to a hydrotherapy tub having an opening through a surface of said tub such that said body covers the opening," or that the water and air inlets be "configured to extend through the opening to transmit" water or air, respectively, to the first and second chambers.

The Examiner has not adequately shown that Martin discloses a device that meets all the limitations of the instant claims. We therefore reverse the rejection of claims 1-10, 18, 21, 23, and 28-32 as anticipated by Martin.

4. OBVIOUSNESS BASED ON MARTIN

Claims 1-18, 21, 23-32, 34-36, 40, and 41 stand rejected under 35 U.S.C. § 103 as obvious in view of Martin and other references, as follows:

- Claims 1-10, 16-18, 21, 23, and 28-32 as obvious in view of Martin;
- Claims 1-10, 16-18, 21, 23-32, 34-36, 40, and 41 as obvious in view of Martin combined with Gardenier;² and

² Gardenier et al., US 6,182,303 B1, issued Feb. 6, 2001.

- Claims 11-15 as obvious in view of “Martin either alone or taken with Gardenier . . . , and further in view of Guiler³” (Answer 6).

In each of these rejections, the Examiner cites Martin as disclosing the device defined by claim 1, and concludes that the limitations of the other rejected claims would have been obvious based on Martin alone or in combination with Gardenier and/or Guiler (Answer 5-7).

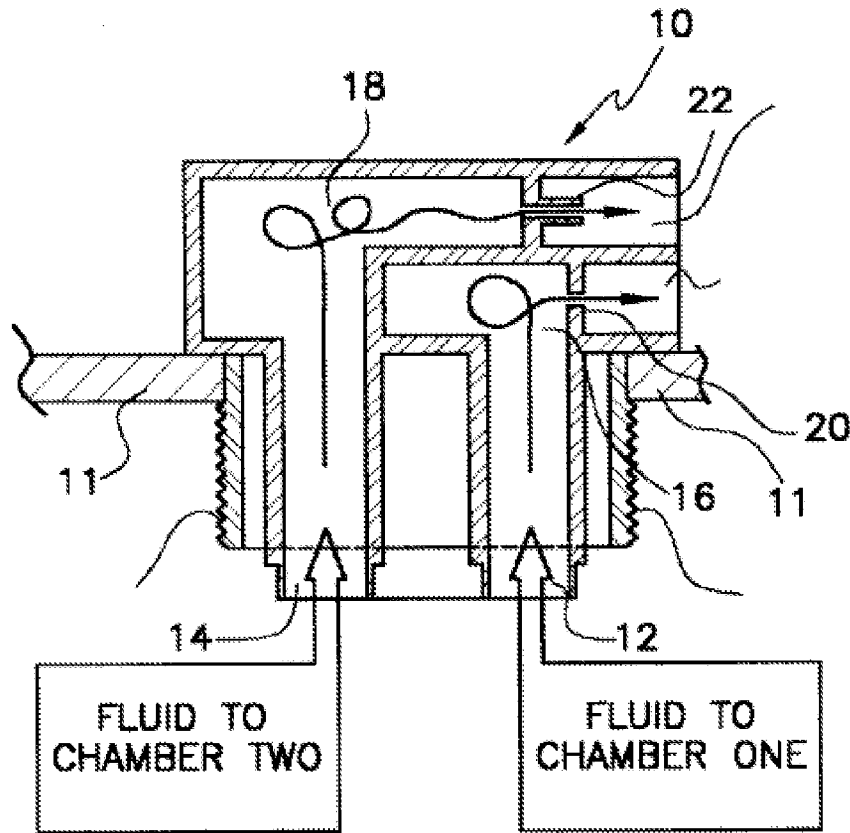
As discussed above, we find that Martin’s device does not meet all the limitations of claim 1. The Examiner has not adequately explained how Gardenier or Guiler make up for the deficiencies of Martin that are discussed above, and therefore has not shown that any of the claims would have been obvious in view of the cited references. The rejections of claims 1-18, 21, 23-32, 34-36, 40, and 41 as obvious in view of Martin, alone or combined with Gardenier and/or Guiler, are reversed.

5. ANTICIPATION BY GARDENIER

Claims 1-5, 7, 10, 18, 21, 24, 25, 28, 29, 31, 32, 34-36, and 40 stand rejected under 35 U.S.C. § 102(a)/(e) as anticipated by Gardenier. The Examiner finds that Gardenier discloses a hydrotherapy tub comprising “an inner surface 11 including an opening (receiving 50); an air source/means (col. 3 lns. 6-9); a water source/means (col. 3 lns. 6-9); a body 10 including a first chamber 16 and a second chamber 18; a plurality of outlets/means 20,22; a water inlet 14; and an air inlet 12” (Answer 4).

The relevant part of Gardenier’s Figure 1 is reproduced below (with unneeded reference numerals omitted):

³ Guiler, US 3,345,982, issued Oct. 10, 1967.



Gardenier describes the figure as showing

a fluid flow device 10 [that] may be mounted onto a hydrotherapy tub wall 11. Fluid flow device 10 comprises a pair of inlets 12 and 14 which are fluidly connected to a first chamber 16 and a second chamber 18 respectively. First chamber 16 has an outlet 20, and second chamber 18 has an outlet 22. Inlet 12 may be fluidly connected to a first fluid supply conduit (not shown), and inlet 14 may be fluidly connected to a second fluid supply conduit (not shown). The fluid supply conduits feed fluids (e.g., water and/or air) to fluid flow device 10.

(Gardenier, col. 3, ll. 1-9.)

We agree with the Examiner that Gardenier anticipates claim 1.

Gardenier's system comprises a body configured to be attached to a hydrotherapy tub through an opening in the wall of the tub. Gardenier states

that the device is securely positioned with a nut or mounted “using epoxy or a similar water-tight sealant” (*id.* at col. 5, ll. 8-16). Gardenier therefore describes the body as immovable and affixed during operation, as recited in claim 1.

Gardenier’s body also comprises two inlets, two chambers, and two outlets. Gardenier states that each of the inlets is connected to a supply conduit that feeds “fluids (e.g., water and/or air)” to the device. Thus, Gardenier discloses that water can be supplied to one inlet/chamber/outlet and air can be supplied to the other inlet/chamber/outlet. In that embodiment, one outlet transmits water from the first chamber to the interior of the hydrotherapy tub and the other outlet transmits air from the second chamber to the interior of the hydrotherapy tub. Thus, the plurality of inlets are configured to collectively “transmit water from said first chamber and air from said second chamber to an interior of the hydrotherapy tub,” as required by claim 1.

Appellants argue that

there is no disclosure in Gardenier et al. of a plurality of outlets adapted to receive water from the first chamber and air from a second chamber, nor such plurality of outlets being configured to transmit the water and air to an interior of a hydrotherapy-tub. Instead, Gardenier et al. discloses two separate chambers with separate inlets and separate outlets. The outlets do not receive water from a first chamber and air from a second chamber, nor are the outlets configured to transmit the water and the air to an interior of the hydrotherapy tub.

(App. Br. 8.) Appellants rely on the same argument for each claim specifically addressed in the Appeal Brief (*id.* 8-9). Appellants also argue that

the claim language recites multiple outlets in fluid communication with a first chamber and a second chamber. There is no alternative language recited in the claim, and it is also not necessary to utilize “both” to achieve the intended result of the outlets being in fluid communication with both chambers, because the word “and” accomplishes the same meaning.

(Reply Br. 4.)

Essentially, Appellants’ argument is that we should interpret the claims to require that each of the plurality of outlets is configured to transmit both water from the first chamber and air from the second chamber into the interior of the tub.

We disagree with this interpretation of the claims. During examination, claims are given their broadest reasonable interpretation consistent with the Specification. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997). The claims on appeal are not limited to a device in which *each* outlet transmits *both* water and air into a hydrotherapy tub. In our view, the broadest reasonable interpretation of the instant claims encompasses the device taught by Gardenier; i.e., a device having a plurality of outlets that collectively transmit water from a first chamber and air from a second chamber into a hydrotherapy tub. Appellants have pointed to no disclosure that would indicate that this interpretation is not consistent with the Specification. We therefore agree with the Examiner that the rejected claims read on, and are anticipated by, the device disclosed by Gardenier.

SUMMARY

We affirm the rejection of claims 1-5, 7, 10, 18, 21, 24, 25, 28, 29, 31, 32, 34-36, and 40 as anticipated by Gardenier, but reverse the rejection under 35 U.S.C. § 112, first paragraph, and the rejections based on Martin.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED-IN-PART

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